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Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	MM Docket No. 96-197
Newspaper/Radio Cross-Ownership	)	
Waiver Policy	)	
	)	

REPLY COMMENTS OF

**BLACK CITIZENS FOR A FAIR MEDIA,
CENTER FOR MEDIA EDUCATION,
CHINESE FOR AFFIRMATIVE ACTION
COMMUNICATIONS TASK FORCE,
HISPANIC NATIONAL BAR ASSOCIATION,
LEAGUE OF UNITED LATIN AMERICAN CITIZENS,
MINORITY MEDIA TELECOMMUNICATIONS COUNCIL,
NATIONAL ASSOCIATION FOR BETTER BROADCASTING,
NOW LEGAL DEFENSE AND EDUCATION FUND,
OFFICE OF COMMUNICATION OF UNITED CHURCH OF CHRIST,
PHILADELPHIA LESBIAN AND GAY TASK FORCE,
TELECOMMUNICATIONS RESEARCH AND ACTION CENTER,
WASHINGTON AREA CITIZENS COALITION INTERESTED IN
VIEWERS' CONSTITUTIONAL RIGHTS,
WIDER OPPORTUNITIES FOR WOMEN,
WOMEN'S INSTITUTE FOR FREEDOM OF THE PRESS**

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SUMMARY

Many of the broadcasters and newspaper publishers who filed comments in this proceeding urge the Commission to substantially relax the newspaper/radio cross-ownership waiver policy or to repeal or gradually eliminate the rule. They argue that the recent explosion of national media outlets suggests that diversity is no longer a valid concern. That claim is demonstrably absurd. First, industry commenters miss the critical distinction between source and outlet diversity. Local diversity of viewpoint in the context of the newspaper/radio cross-ownership rule requires that the source of local content be independently-owned and exercise editorial control over the content. Second, cable television, the Internet, direct broadcast satellite, and other emerging video-delivery systems produce little or no local content themselves, are simply alternative outlets for redistributing content, or are so new that they could have little or no impact on local discourse.

Contrary to the claims of industry commenters, the trend toward consolidation of radio station ownership actually increases the likelihood that cross-ownerships will harm local diversity. Allowing newspaper/radio combinations in the wake of widespread radio consolidation would concentrate market power and editorial control in very few hands. Black Citizens for a Fair Media et al. believe that this is a particularly dangerous phenomenon in small markets and will increase market entry barriers for small businesses, including minorities and women.

Therefore, we argue that concern for local diversity of viewpoint as well as for the viability of small markets and small businesses counsel the Commission to proceed cautiously. In order to ensure that newspaper/radio combinations occur only in markets

that can withstand the inevitable loss of diversity, Black Citizens for a Fair Media et al. urge the Commission to adopt an independent voice/market rank standard and require applicants to show specific, concrete, and quantifiable public interest benefits.

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Black Citizens for a Fair Media, Center for Media Education, Chinese for Affirmative Action, Communications Task Force, Hispanic National Bar Association, League of United Latin American Citizens, Minority Media Telecommunications Council, National Association for Better Broadcasting, NOW Legal Defense and Education Fund, Office of Communication of the United Church of Christ, Philadelphia Lesbian and Gay Task Force, Telecommunications Research and Action Center, Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights, Wider Opportunities for Women, Women's Institute for Freedom of the Press (Black Citizens et al.) hereby submit reply comments in response to the Commission's Notice of Inquiry, Newspaper/Radio Cross-Ownership Waiver Policy, MM Docket No. 96-197, (released October 1, 1996) (the Notice). These comments demonstrate that the record in this proceeding does not support substantial changes to the Commission's current waiver policy.

I. The FCC Should Reject Claims that Changes in the Media Marketplace Warrant Repeal of the Newspaper/Radio Cross-Ownership Rule or Substantial Relaxation of the Waiver Policy.

Many of the broadcasters and newspaper publishers who filed comments in this proceeding urge the Commission to repeal or gradually eliminate the newspaper/radio cross-ownership rule.[1] However, the Commission only sought comment on what changes, if any, it should make to its waiver policy.[2] Therefore, arguments for eliminating the rule are beyond the scope contemplated by FCC, would raise Administrative Procedure Act hurdles if the FCC chose to act on them, and should not be considered.

Other commenters also argue that widespread changes in the media marketplace and the emergence of a variety of new media outlets decrease concerns about diversity and support a substantial relaxation of the waiver policy.[3] Without doubt, the mass media marketplace of the 1990's includes non-broadcast media that did not exist in the 1970's. But that observation alone misses the point. The relevant question for the purposes of the newspaper/radio cross-ownership rule is whether local communities have sufficient independently-owned sources of local news, public affairs

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[1] See e.g., Cox Enterprises, Inc., & Media General, Inc. (Cox), Newspaper Association of America (NAA), Pulitzer Publishing Company (Pulitzer), Gannett Co., Inc. (Gannett), National Association of Broadcasters (NAB).

[2] Notice, at ¶10.

[3] Cox, at 6-7; NAA, at 7; ABC, Inc. (ABC), at 7. We will primarily respond to the arguments of Cox, NAA, and ABC because these commenters provide the most comprehensive treatment of this issue (hereinafter Commenters).

programming, and other informational programming concerning local issues.[4] Commenters who argue for the inclusion of new media miss the critical distinction between independently-owned sources of local content and independently-owned outlets that redistribute local content. Since the newspaper/radio cross-ownership rule seeks to promote diverse viewpoints, a source of local news and public affairs content must not only be independently owned and operated, but must also exercise editorial control over the content. Commenters have not demonstrated that these new media contribute in this way to local viewpoint diversity.

A. The Recent Explosion of National Media Outlets Has Not Increased Local News and Public Affairs Programming.

NAA, Cox, and other commenters argue that alternative video delivery systems including cable television, direct broadcast satellite (DBS), multipoint multichannel distribution service (MMDS or wireless cable), satellite master antenna television (SMATV), local multipoint distribution services (LMDS), low power television (LPTV), open video systems (OVS), and the Internet contribute significantly to local viewpoint

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[4] Cox argues that the Commission focuses too narrowly on local news and public affairs programming as a measure of diversity and suggests that entertainment programming should also be included because it informs the electorate. Cox, at 14. However, the concern that radio broadcasters serve the informational needs of the local community with non-entertainment programming dates back to the 1927 Radio Act.

Moreover, in its 1981 Radio Deregulation Order, the Commission reaffirms the importance of serving local needs: "[the] history of governmental involvement in non-entertainment programming has been driven by one overriding concern—the concern that the citizens of the United States be well informed on issues affecting themselves and their communities. It is with such information that the citizenry can make the intelligent, informed decisions essential for the proper functioning of a democracy." In the Matter of Deregulation of Radio, 84 FCC 2d 968, 977 (1981)(citing Garrison v. Louisiana, 379 U.S. 61, 74-75, "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.")

diversity.[5] The FCC should reject these claims. These electronic media produce little or no local content themselves, are simply alternate outlets for redistributing content, or are so new that they could have no impact on local discourse.

1. Cable television

Although cable television may be the dominant multichannel video programming distributor, the Commission should not assume that the mere existence of a cable system in a community produces diversity of viewpoint on local issues. Most cable programming consists of nationally-oriented sports, entertainment, and news coupled with retransmitted local broadcast signals. Retransmission of local broadcast stations does not increase local viewpoint diversity because it merely distributes the same viewpoint already available from another outlet.

However, ABC and Cox counter that leased access, PEG and local cable news channels provide ample local content.[6] Black Citizens et al. agree that where substantial programming on matters of local concern is offered by cable systems on local news channels[7] or through leased access and PEG programming, viewpoint diversity may be enhanced. However, leased access and PEG programming is far from

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[5] NAA, at 9, 16-17; Cox, at 6-7. See also Pulitzer, at 6-7; Malrite Communications Group, Inc. (Malrite), at 4, 6-7.

[6] ABC, at 8; Cox, at 13-14.

[7] In 1995, there were only twelve independently produced cable news services providing regional or local news programming for cable systems. Broadcasting & Cable Yearbook 1996 (R.R. Bowker, Reed Reference Publishing Company 1996), at G-95. In November of 1996, Arizona News Channel also entered the local cable news market. However, these news services are concentrated in the top national markets and, therefore, only offer a small percentage of cable subscribers an alternative to local broadcast news.

widespread and often is not focused on local, public affairs issues.[8] A recent study surveying 149 cable systems in the top 100 markets found that only eight percent of cable operators were leasing capacity.[9] Similarly, while PEG programming can provide a valuable independent outlet for local affairs, in many communities this opportunity is underutilized.[10]

2. Internet and other online services

In addition to cable, many commenters point to the Internet as an example of an emerging technology which substantially enhances diversity.[11] However, because of its

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[8] PEG channels are used for a variety of purposes, not all related to issues of local concern. For example, New York City has used its PEG channels for Japanese language courses, Italian game shows, and horse racing. Michael McMenamin, "Judge Gags Rudy and Rupert," Reason, Feb. 1,1997, at 53. Thus, any claim that leased access or PEG channels abound in a market should be substantiated to assure that local viewpoint diversity is being enhanced.

[9] Third Annual Report, In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Doc. 96-113, FCC 96-496, (released January 2, 1997), at ¶167 (Annual Report)(citing a study conducted by Video Information Providers for Nondiscriminatory Access (VIPNA)).

[10] Oral argument by Department of Justice attorney, Jacob Lewis, U.S. Court of Appeals for District of Columbia Circuit (noting, in response to the claim that some localities require as many as thirteen PEG channels, that the majority of localities require none at all). FCC Report, "Appeals Court Hears Challenge to All Federal Cable Regulation," Vol. 14, No. 22, Nov. 22, 1995. The Alliance for Community Media also estimates that approximately 2000 systems have any PEG access. Comments of Center for Media Education, et al., at 21 (CS Docket 96-60)(May 15, 1996). Some major cities, such as Philadelphia, Los Angeles and Tampa and five states—Delaware, Utah, Wyoming, South Caroline and West Virginia—have no public access facilities. Id, at 22.

[11] See e.g., NAA, at 21 (arguing that the Internet has amplified political debate); National Newspaper Association (NNA), at 7 (arguing that diversity should be redefined to include novel media such as the Internet); Cox, at 23 (arguing that Internet access illustrates that spectrum limits no longer constrain diversity); Journal, at 9 (claiming that computers are replacing traditional media sources for a growing percentage of people

structure the Internet does not fit well into the rubric of the newspaper/radio rule. First, the Internet is a narrowcast or multi-cast medium rather than a broadcast medium.[12] That means that unlike local broadcast media, individual users must themselves target particular Internet sites. Because Internet content must be sought out by an end-user, it does not reach a broad audience in a manner comparable to broadcast.[13]

More important, the Internet still lacks an audience comparable to broadcast media or newspapers. Although estimates of Internet use differ widely, a recent study of Internet use estimates that only 10 percent of those who claim to use the Internet, or 4.2 million adults, actually spend a significant amount of time online.[14] Internet usage,

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for whom the loss of diversity resulting from cross-ownership would be nearly imperceptible).

[12] For example, WebTV CEO Steve Pearlman does not perceive the Internet as in competition with broadcast media. Distinct from broadcast media, "the Internet's narrowcast model caters to specific interests." Hapner and Tanaka, "Info Hits Home," Newsweek, Nov. 11, 1996, at 84.

[13] On the subject of political discourse, Internet authority Charles Bowen astutely observes that the Internet's most popular access route, the World Wide Web, is a part of a medium (the Internet) which is distinct from mass-media altogether. He comments: "The Web differs from more traditional political instruments in the fact that it is a vehicle for narrowcasting as opposed to the broadcast nature of mass media." Dan Radmacher, "Digital Politics: Tracking On-Line Politics, Activism,and Computerized Citizenship," Charleston Gazette & Daily Mail, Sept. 15, 1996, at 1E. In fact, Bowen discusses the Internet as a tool for political activism and campaigning, now at an early stage of development, comparable to television of the 1950's. He fears that narrowcasting on the Internet may have the negative impact of worsening what many perceive as the "global epidemic of tunnel vision." Id.

[14] Lori Hawkins, "Net Getting Less Geeky, Survey Says," Austin American-Statesman, Feb. 19, 1997, at D1 (citing IntelliQuest survey). The survey also found 40 percent of those who claim to use the Internet actually spend less than two hours per week online. Id. In addition, since e-mail emerged as the most popular Internet application, "Financial New," PR News Wire, Feb. 18, 1997, higher estimates of Internet use probably reflect a very limited kind of Internet exposure.

therefore, is far below the penetration rates of broadcast media and newspapers. Equally important, local news and public affairs content is not yet widespread on the Internet. While there is increasing interest in providing more local and regional news and magazines via the Internet, analysts forecast that the Internet will be used primarily to complement existing radio and television stations, rather than provide independent, competing services. For example, local or regional Internet services plan to repackage newspaper and broadcast-originated content and couple it with commercial tie-ins such as restaurant guides, classified ads, merchant lists, and coupons.[15]

3. Direct Broadcast Satellite

In addition to cable and the Internet, many commenters suggest that DBS enhances local viewpoint diversity.[16] We disagree. Although DBS subscribership is higher than any other multi-channel video programming delivery alternative to cable, it too has much lower penetration rates than broadcast or newspapers.[17] More important, DBS programming is national and international in scope and focused primarily on sports

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[15] "Microsoft Plans Internet Regional Magazines," The Financial Post, Mar. 23, 1996, at 1. MSNBC plans to access 215 newsrooms around the country to provide content for its on-line supplement to its cable news channel. However, NBC would maintain editorial control of the Internet site. "The Latest in Web, 24-hour News Hype," NewsInc, Vol. 8, No. 2, Jan. 22, 1996. Similarly, Prodigy Services Co., the third ranked U.S. on-line service, works with newspapers in Chicago, Florida, and Atlanta "to tailor local material." Id. These Internet sites merely plan to redistribute news gathered and produced by local newspapers without exercising editorial control.

[16] See e.g., Cox, at 9; NAA, at 9; Journal, at 9; NNA, at 7.

[17] As of October 1996, there were only 3.82 million DBS subscribers in the U.S. compared to 62.1 million cable subscribers. Annual Report at ¶39.

and entertainment rather than on news or public affairs.[18] The current structure of the medium—using satellites to beam programming to the entire country—would make local news gathering and community-specific public affairs programming difficult. In addition, DBS providers generally cannot retransmit local broadcast network signals.[19] Even if that prohibition were removed, DBS providers would merely be retransmitting local broadcast programming, not adding distinct editorial perspectives.[20]

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[18] The vast majority of the programming offered by DIRECTV (the DBS service that garners nearly two-thirds of DBS subscriptions) constitutes pay per view movies, national and international sports, national and international news and general entertainment networks. Web Site, http://www.directv...mming/channels.html. News offerings are substantial, but not local, including: Bloomberg Information Television, CNN, CNN International, CNBC, C-SPAN and C-SPAN2, Court TV, Fox News Channel, Headline News, MSNBC, Newsworld International, The Weather Channel. The only programming with any local content is The Weather Channel, which includes local conditions and updates, but does not have an editorial viewpoint. Id.

[19] See Satellite Home Viewers Act of 1994, Pub. L. No. 103-369, 108 Stat. 3477 (1994).

[20] Although Rupert Murdoch has announced plans to beam both local broadcast stations and cable channels via a newly formed DBS company called Sky, his plan cannot go forward without regulatory changes and Congressional approval. Mark Landler, "The Murdoch Jolt," N.Y. Times, Mar. 13, 1997, at D21. USSB CEO Stanley S. Hubbard is skeptical about Sky's local plans, claiming there isn't enough bandwidth to cover every local station. Jim McConville and Harry A. Jessell, "Competition from the Sky," Broadcasting & Cable, Nov. 25, 1996, at 25. According to Broadcasting & Cable, by using digital compression, Sky should be able to deliver at least 270 stations which would only cover the "top stations in the top markets." Id. Thus, for the majority of markets, DBS would still supply predominantly national and international rather than local programming.

4. Emerging video-delivery systems

Other commenters propose that alternative or emerging video delivery systems, such as wireless cable, SMATV, LMDS, OVS, and LPTV, contribute local viewpoints.[21] However, as the Commission is well aware and the arguments of the commenters themselves illustrate, many of these systems are either in their infancy and serve only a small percentage of consumers or are still in the early stages of development and have not yet been fully deployed. The Commission's Third Annual Report on the status of competition in the video market indicates that MMDS, SMATV, LMDS, and OVS are far from widespread and, although some may have the potential to originate local programming, are not now locally-focused.[22] Therefore, for the purposes of the

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[21] See e.g., Cox, at 6 (citing the increasing competitiveness of wireless cable and the ultimate transformation of the video programming and distribution marketplace by eventual competition from telephone company entry into video); Pulitzer, at 6-7 (suggesting that SMATV significantly contributes to diversity, and that wireless is poised to compete with wired cable); NAA, at 17 (claiming that publishers and broadcasters currently face competition from wireless cable and SMATV, and that telephone company video services will soon foster the growth of new media).

[22] For example, wireless cable has existed for some time and the total number of subscribers at the end of 1995 was only 847,000; growth in 1996 has been slower than expected. Annual Report, at ¶52. According to the Third Annual Report, even if optimistic predictions of three million subscribers by 1999 hold true, wireless cable systems would still reach a much smaller audience than broadcast or newspapers. Id. There is also no indication that these systems would offer more local programming than wired cable television systems.

SMATV subscribers numbered approximately 1.05 million at the end of 1996, and while programming may be geared toward niche markets, it too does not focus any more than traditional cable on local issues. Id., at ¶81. LMDS is truly in its infancy, with only 6500 subscribers in New York. Id., at ¶65. Similarly, the entry of local exchange carriers into the video delivery market (again carrying the same programming as traditional cable) is still in the early stages with LECs testing only a few local markets. Id., at ¶79. Finally, LPTV service is extremely limited, with minimal impact in the video market; moreover, growth is unlikely due to a freeze on licensing within 100 miles of the 36 largest markets. Id., at ¶94.

newspaper/radio cross-ownership rule, claims that these alternative media provide local viewpoint diversity are, at best, premature.

B. As the Trend Toward Consolidation in Broadcast Increases, the Need to Protect Independent Voices, Particularly in Small Communities, Increases.

Commenters also argue that consolidation in the radio industry supports relaxation of the Commission's waiver standard for newspaper/radio cross-ownerships.[23] For example, ABC argues that if a community has a variety of competing media voices, then the number of separate radio owners that compete is irrelevant.[24] However, the trend toward consolidation of radio station ownership actually increases the likelihood that cross-ownerships will harm local viewpoint diversity.[25] Allowing newspaper/radio combinations in the wake of widespread radio consolidation would concentrate market power and editorial control in very few hands. This is particularly dangerous in smaller markets with only one daily newspaper and few radio stations because cross-ownership homogenizes the editorial perspectives of the cross-owned

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[23] See e.g., Journal, at 3 (arguing that cross-ownership is critical if newspapers are to compete with group-owned radio stations).

[24] ABC, at 10 ("Concerns that the [number of radio owners] may be declining in some communities should not deter the Commission from proceeding with a general relaxation of policy that is plainly warranted.")

[25] Commenter Mid-West Family Stations notes that newspaper/radio cross-ownership diminishes the benefits associated with the trend in radio consolidation. Only since passage of the 1996 Telecommunications Act increased the number of radio stations one owner could control in a market "have radio companies had a sufficient base of advertising inventory and demographic reach to truly begin to compete with newspapers for local advertising dollars." Mid-West, at 3-4. Cross-ownership risks stifling these gains in the relative competitiveness in markets for local news and public affairs programming and content, which in turn risks reducing local viewpoint diversity.

voices and reduces local viewpoint diversity regardless of the number of outlets remaining in the market.[26] Commenters representing broadcasters and newspaper publishers in small markets, including the Tennessee Association of Broadcasters (TAB), Mid-West Family Broadcasters, and David E. Hoxeng, ADX Communications (ADX) share these concerns.[27]

The recent acquisition of Chancellor Broadcasting Corporation by Evergreen Media Corporation also illustrates that a strict waiver policy is still necessary to protect small markets. Evergreen's new Chairman, Thomas O. Hicks, admitted that after the merger he "expects advertising rates to climb as bigger players control an increasing share of the market."[28] This suggests that under the current waiver policy, multiple radio station owners will garner increased advertising revenues and have incentives to compete vigorously with newspapers. One possible result is increased investment in

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[26] Former president of NBC News and the Public Broadcasting System, Larry Grossman, is concerned about diversity in the wake of corporate media consolidation. He perceives that: "It's not really the simple thing of: 'you print what I like or you're fired.... It's an environment that's set up, a corporate environment where people with odd views are not encouraged and tend not to be hired." Alexandra Marks, "New Media Alliances Test Press Objectivity," The Christian Science Monitor, July 2,1996, at 3.

[27] TAB argues that cross-ownership will weaken the competitive position of radio. TAB, at 5-6. ADX asserts that "[g]iving a monopoly publisher influence over <u>any</u> radio station in the same market further extends that monopoly while quieting an independently-owned voice that can offer a diverse editorial approach to news and affairs in a given community." ADX, at 2. Mid-West states that the loss of viewpoint diversity from a newspaper's permanent ownership of even one radio station would outweigh any potential public interest benefits in the majority of cases. Mid-West, at 3. Mid-West is also concerned that cross-subsidization would allow the cross-owner to underprice competing stations for advertising. Id.

[28] Neal Templin, "Evergreen Media to Buy Radio Chain," Wall St. Journal, Feb. 19, 1997, at A3.

radio news services and innovative public affairs programming with diverse local viewpoints. If, on the other hand, cross-ownership becomes more prevalent and the same owner controls both the local newspaper and multiple local radio stations, the owner would be more inclined to pocket increased profits rather than use profits to compete more aggressively with its own newspaper.

II. Relaxing the Waiver Policy Would Disproportionately Affect Small Businesses, Women, and Minorities.

In Part III of our original Comments, we demonstrated that relaxation of the waiver policy would significantly increase barriers to entry for small businesses, including those owned by minorities and women.[29] Although many of the waiver proposals endorsed by other commenters would increase entry barriers exponentially, those commenters fail to address the issue. As the Commission is well aware, most minority and female participants in the communications market are small, independent business owners. The most difficult obstacle to market entry by these groups remains access to capital. As stations continue to consolidate, the start-up costs for market entry rise as do the costs of competing with ever larger players. Consolidation creates a cycle that squeezes out smaller, independent participants who traditionally lack both the capital reserves to survive predatory tactics and the economies of scale to compete for advertising revenue with large, horizontally integrated media conglomerates. Small businesses, including those owned by minorities and women, will be the first to be squeezed out of the market.

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[29] Comments of Black Citizens for a Fair Media et. al., MM Doc. No. 96-197 (February 7, 1997), at 20, 22-23 (Black Citizens et al., February 7, 1997).

Many commenters justify relaxation of the waiver policy by pointing to increased operating efficiencies and synergies. Pulitzer cites co-located facilities and common staffing as examples of efficiencies and operational synergies that would result from "[l]ifting the artificial impediment of the cross-ownership restriction."[30] Economic efficiencies can of course benefit the public interest. However, it is precisely this type of streamlining that threatens to reduce the crucial training and opportunities for management experience that minorities and women need to become owners. If the Commission decides to relax the waiver policy, it should do so in a manner consistent with its commitment to eliminate barriers to entry for minorities and women, by requiring waiver applicants to demonstrate specific and quantifiable offsetting benefits such as implementing a minority/female incubator program. The Commission should refuse to consider waiver requests premised on purely economic or convenience-based efficiencies or operational synergies because such "benefits" may not offset the loss to viewpoint diversity.[31]

III. A Moderate Approach to Relaxing the Waiver Policy Precludes Adopting a Presumptive Waiver Standard with Criteria So Flexible that The Standard Undermines the Rule Itself.

Black Citizens et al. agree with the majority of commenters that an appropriately crafted presumptive waiver standard would provide predictability and administrative convenience. However, many of the waiver proposals suggested by industry commenters would place the burden on the public to prove loss of diversity, and thus,

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[30] Pulitzer, at 11.

[31] See infra notes 35, 36 and accompanying text.

are the equivalent of eliminating the rule. For example, NNA urges the Commission to adopt a presumption in favor of waiver, where waivers would be granted unless a member of the public objects.[32] NNA would allow members of the community to block waiver applications only if they could demonstrate that diversity would be diminished by the waiver.[33] This approach would rewrite the rule to allow cross-ownerships except in extraordinary circumstances where it is possible to prove loss of diversity prior to the waiver.

The remaining commenters generally endorse some version of a minimum independent voice/market rank standard, but would forego a specific public interest showing.[34] First, they argue that there are numerous public interest benefits inherent in

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[32] NNA, at 8-9.

[33] NNA, at 9. Scranton Times also urges the Commission to allow newspapers to own up to eight radio stations in a single market and would place the burden on challengers to show that grant of the waiver would harm the public interest. Scranton, at 3-4. See also Journal, at 10-11 (urging the Commission to adopt a sliding scale based on the number of stations an applicant already owns compared to the total number of stations in the market); Malrite, at 7-8 (proposing a market-by-market analysis).

[34] Cox, Gannett, and NAA propose a waiver standard based solely on the number of voices remaining in the market after the waiver. They consider market rank irrelevant and believe that requiring 30 independent voices is a conservative standard that sufficiently protects diversity. Cox, at 10-11; Gannett, at 4; NAA, at 42-43. ABC urges a top 50 markets/30 independent voices standard. ABC, at 12, 15-16. Mid-West endorse a top 25/50 market standard coupled with a separate affirmative determination that special benefits to the public outweigh the loss of diversity. Mid-West, at 5-6. Mid-West believe that the number of broadcast outlets in a local market is irrelevant. Mid-West, at 4-5. Finally, Malrite urges the Commission to consider market size and the number of independent voices without adopting numerical guidelines. Malrite, at 5, 8.

cross-ownership, including operational synergies and efficiencies.[35] However, the Commission has never found these vague, non-specific benefits sufficient to offset the loss of diversity caused by common ownership.[36] Cox, NAA, and ABC also claim that requiring a public interest showing would undermine the objectivity and predictability of a presumptive standard.[37] We disagree. Under our waiver proposal, an applicant would be required to make its showing specific, concrete, and quantifiable.[38] Therefore, the Commission would easily be able to determine whether the applicant or licensee has met the standard. By contrast, a presumptive waiver policy that does not require an affirmative showing of public interest benefits would quickly subsume the underlying rule.

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[35] Specifically, ABC and several other commenters cite new efficiencies, shared news-gathering expenses, efficiencies for advertisers, long history of service to and knowledge of the community, experimentation, and more effective local newsgathering and public affairs programming. ABC, at 14-15; NAA, at 32; Pulitzer, at 10-11.

[36] These arguments were made and rejected in 1975 when the Commission adopted the newspaper/radio cross-ownership rule and the Commission has consistently rejected these arguments since then. Multiple Ownership Standard, FM, and Television Broadcast Stations, Second Report and Order, 50 FCC 2d 1046, 1064 (1975), recon., 53 FCC 2d 589 (1975), aff'd sub nom, FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978). See also Hopkins Hall Broadcasting, Inc., 10 FCC Rcd 9764, 9766 (1995); Capital Cities/ABC, Inc., 11 FCC Rcd 5841, 5893-5894 (1996).

[37] Cox at 19; NAA at 52-53; ABC at 14.

[38] Comments of Black Citizens for a Fair Media et al., at 24, 29 (February 7, 1997).

A. Non-Broadcast Media and Alternative Video-Delivery Systems Should Not Be Counted in Calculating The Number of Independent Voices Remaining in the Market After a Waiver.

Black Citizens et al. also urge the Commission to retain its current policy of excluding non-broadcast media and alternative video delivery systems from its minimum remaining voices analysis. Several commenters, including ABC and NAA propose to define the "market" broadly to include all information sources available in a market, including purely advertising supplements like the Yellow Pages, outdoor advertising, weekly shoppers and penny savers.[39] One newspaper publisher even suggests counting department stores and major manufacturers because they influence public opinion on local issues.[40] ABC also submitted an analysis prepared by Economists Incorporated that argues that cross-ownerships are not anti-competitive because newspapers have a much smaller share of the relevant product market than the Commission estimated.[41] However, this study is inherently flawed because it limits the relevant product market to advertising and ignores programming.[42] For all the

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[39] See ABC at 25; NAA at 48; Pulitzer at 7; Malrite at 2,4.

[40] Reading Eagle Company, at 8, n.8.

[41] See ABC, at Appendix C, Economists Incorporated, "An Empirical Investigation of the Scope of Competition Among Newspapers, Radio, Television and Other Advertising Media."

[42] According to Professor Douglas Gomery, University of Maryland College of Journalism, defining the relevant product in such a narrow, self-interested manner excludes the audience, who is an integral part of the advertising transaction. Professor Gomery indicates that there is a real danger to approaching viewpoint diversity from the advertisers' perspective. Advertisers attempt to reach persons with purchasing power or who are willing to switch brand loyalty. This means that the elderly, low income individuals and children who either have no independent incomes or are unlikely to switch brands are never part of the equation. In limiting the relevant product market to

reasons we discussed in Part I supra, alternative and non-broadcast media, although they may be alternative advertising outlets, are not sources of informational content about issues of local concern, and, therefore, are only marginally relevant to the combined diversity/competition analysis required by the newspaper/radio cross-ownership rule.

B. Market Rank Must Be An Integral Part Of a Presumptive Waiver Standard.

The Commission should also include market rank as an integral factor in its presumptive waiver standard. ABC, Cox and NAA suggest that market rank is irrelevant where 30 independent voices remain because 30 independent voices ensure diversity.[43] However, as recently as the 1996 Telecommunications Act, Congress re-affirmed the relevance of market rank. In the one-to-a-market context, Congress did not choose to remove the market rank criterion, but instead to increase the threshold from the top 25 to the top 50 markets.[44]

Black Citizens et al. believe that the market rank factor provides supplemental protection of viewpoint diversity for smaller markets, where there are often only a handful of radio stations. However, the importance of the market rank factor depends on how the Commission implements the minimum voice test. If the Commission decided to count either non-broadcast media or broadcast stations whose contours

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advertising, ABC and Economists Incorporated disenfranchise several segments of the audience. Telephone Interview with Douglas Gomery, March 19, 1997.

[43] ABC, at 15-16; Cox, at 10-11; NAA, at 42-43.

[44] 1996 Telecommunications Act §202(d); See also H.R. Conf. Rep. 104-458, at 163 (1996).

partially or technically intersect the affected market, but do not really serve the needs of the community, then a market rank threshold would be necessary to protect small markets that have fewer voices. Moreover, the number of voices in a market at any given time is always in flux. Some smaller markets may contain the minimum thirty remaining voices at the moment when a waiver application is pending or granted. If the waiver is granted in such a market, station failure or further consolidation may result in fewer than thirty remaining voices in the market shortly after the waiver. In order to ensure that newspaper/radio combinations only occur in markets that can withstand further loss of diversity, the Commission must consider market rank.

Conclusion

For the foregoing reasons, we urge the Commission to adopt a presumptive waiver standard that includes both market rank and independent voice criteria and to exclude non-broadcast media voices. Such a standard will be both easy to administer and protect local viewpoint diversity.

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